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No. 73-567

Supreme Court, U. S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1973

WERNER STEIN,

Petitioner,

vs.

CITY OF NEW BERLIN,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

THEODORE M. SCHOBER,
City Attorney
T. MICHAEL SCHOBER,
Assistant City Attorney
13825 W. National Avenue
New Berlin, Wisconsin 53151

Attorneys for Respondent

Wisconsin Law Printing, Incorporated, Milwaukee, Wisconsin

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The respondent, CITY OF NEW BERLIN, prays that an order issue denying the Petition of WERNER STEIN for a writ of certiorari to review the opinion and judgment of the Supreme Court of the State of Wisconsin rendered in these proceedings on April 20th, 1973.

QUESTIONS PRESENTED

Petitioner maintains that the Wisconsin Supreme Court can not extend the limitation of time as set forth in Section 62.23(7) (da) of the 1957 Wisconsin Statutes. Respondent contends that Section 62.23(7) (da) of the 1957 Wisconsin Statutes does not apply to the instant matter, and that the decision of the Supreme Court of the State of Wisconsin is based upon sound State grounds. Respondent further submits that the interpretation of what particular statutes of a State mean and the extent to which any provisions may be limited or affected by other acts, are questions which are reviewable by the highest Court of the State of Wisconsin. The question in this matter is not a proper question for consideration by the Supreme Court of the United States.

STATUTES AND LAWS INVOLVED

Section 62.06 (8) of the 1957 Wisconsin Statutes which was repealed August 11, 1959:

> "(8) EXISTING ORDINANCES. Ordinances in force in the territory or any part thereof, so far as not inconsistent with the provisions of chapter 62, shall continue in force until altered or repealed."

Chapter 261, Laws of 1959, effective August 11, 1959 enacting *Section 66.019 (2) of the Wisconsin Statutes* which reads:

> "(2) EXISTING ORDINANCES. Ordinances in force in the territory incorporated, or any part thereof, insofar as not inconsistent with chs. 61 and 62, shall continue in force until altered or repealed."

Section 62.23 (7) (da) of the 1957 Wisconsin Statutes:

> "(da) Interim zoning. The common council of any city which has not adopted a zoning ordinance may, without referring the matter to the plan commission, enact an interim zoning ordinance to preserve existing uses while the comprehensive zoning plan is being prepared. Such ordinance may be enacted as is an ordinary ordinance but shall be effective for no longer than 2 years after its enactment."

Section 62.23 (7) (h) of the 1957 Wisconsin Statutes:

> **"(h) Nonconforming uses. The lawful use of a building or premises existing at the time of the adoption or amendment of a zoning ordinance may be continued although such use does not conform with the provisions of the ordinance . . ."**

STATEMENT OF THE CASE

On February 17th, 1959, the CITY OF NEW BERLIN was incorporated, the lands subsequently acquired by Petitioner being within the boundaries of the CITY. Prior to its incorporation, the area included in the CITY OF NEW BERLIN was known as the Town of New Berlin. Such Town had a zoning ordinance which zoned all of the lands acquired by WERNER STEIN "agricultural". Petitioner, Werner Stein, acquired lands in the CITY OF NEW BERLIN in April of 1960. On May 29th, 1959, the CITY OF NEW BERLIN enacted an ordinance entitled:

> "AN ORDINANCE TO ADOPT AND AMEND THE ZONING ORDINANCE OF THE TOWN OF NEW BERLIN AS INTERIM ZONING ORDINANCE IN THE CITY OF NEW BERLIN, WAUKESHA COUNTY, WISCONSIN".

Such ordinance was found by the Supreme Court of the State of Wisconsin to not be an "interim" ordinance as defined in Section 62.23(7) (da) of the 1957 Wisconsin Statutes. Had Section 62.23(7) (da) applied, it would have limited the existence of the intermediate New Berlin ordinance to a period of two (2) years. Under the May 29th, 1959 CITY OF NEW BERLIN ordinance, the zoning and use of the lands which petitioner subsequently acquired remained unchanged, "agricultural". Petitioner argues that the ordinance of May 29th 1959, was an "interim" ordinance pursuant to Section 62.23(7) (da) of the Wisconsin Statutes and therefore expired two (2) years after its enactment. Following this logic, petitioner argues that after the expiration of such ordinance, having been extinguished by Statute after two (2) years, the petitioner established a valid non-conforming use of his premises, prior to the adoption of the comprehensive zoning ordinance enacted by the CITY OF NEW BERLIN on June 5th, 1962.

REASONS FOR DENYING THE WRIT

The language of Section 62.23(7) (da) of the 1957 Wisconsin Statutes applies to ". . . any City which has not adopted a zoning ordinance. . .". Section 62.23(7) (da) of the 1957 Wisconsin Statutes was intended to apply to newly incorporated municipalities which as a Town did not have zoning ordinances. Such Statute has no application to the matter at hand, for the CITY OF NEW BERLIN had incorporated from a Town which had a zoning ordinance. Wisconsin State Law, Section 62.06 (8) until August 11th, 1959, and Wisconsin Statutes 62.019 (2) after August 11th, 1959, provided that a Town's zoning ordinances continued in force in a City which incorporated from a Town if the Town had zoning ordinances. No affirmative action on the part of the newly incorporated municipality was necessary under State law.

Section 62.23(7) (da) of the 1957 Wisconsin Statutes by its express language allowed the CITY to enact an "interim" ordinance without referring the matter to the plan commission. The procedure which the City utilized in the passage of the May 29th, 1959, ordinance was not the procedure which would have been utilized had the City desired to freeze existing uses while in the process of investigating a general zoning scheme. The May 29th, 1959, CITY OF NEW BERLIN Zoning Ordinance was enacted by the New Berlin Common Council upon the resolution of recommendations submitted to it by the Plan Commission. Such recommendation and resolution was not required by Section 62.23(7) (da) of the 1957 Wisconsin Statutes.

The last indication that the May 29, 1959, Zoning Ordinance of the CITY was not an interim ordinance is that it did not preserve existing uses. Rather, it adopted some uses in existence by virtue of the Town ordinance (as inherited by the CITY) and amended other uses. This is not permitted by Section 62.27(7) (da) of the 1957 Wisconsin Statutes.

The May 29th, 1959, CITY OF NEW BERLIN Zoning Ordinance, therefore, was not subject to the two year limitation upon the zoning ordinances passed under Section 62.23 (7) (da) of the 1957 Wisconsin Statutes. The ordinance dated May 29th, 1959, continued until superseded by enactment of the Comprehensive Zoning Ordinance dated June 5th, 1962. The uses to which the defendant put his land during the time that he purchased it up to the time this matter was initially considered by the Circuit Court of Waukesha County, was contrary to the Zoning Ordinances which existed except as to the renting of a stable for horses.

An additional state ground is present upon which the decision of the Trial Court and Supreme Court of the State of Wisconsin is based. The Trial Court (Branch I, Circuit Court for Waukesha County, Wisconsin, Honorable William E. Gramling, presiding) determined that the evidence of the Petitioner, WERNER STEIN, fell far short of establishing a valid nonconforming use. The Wisconsin Supreme Court approved the reasoning of the Trial Court indicating:

> "...there is no question Stein's use of his premises, other than renting a stable for horses, violated the zoning restrictions applicable to his land."

58 Wis. 2d 417, 423; See at Appendix to PETITION FOR WRIT OF CERTIORARI Page 8a.

The decision of the Trial Court and Wisconsin Supreme Court rests on adequate independent state grounds. The United States Supreme Court in such a situation should not review their decision. *Dixon v. Duffy,* Cal. 1951, 72 S.Ct. 10, 342 U.S. 33, 96 L.Ed. 46. *Young v. Roger,* Ill.1949, 69 S.Ct. 1073, 337 U.S. 235, 93 L.Ed. 1333.

As is demonstrated by both this BRIEF and the PETITION FOR WRIT OF CERTIORARI, in this matter the crux of the arguments originating from the respective parties is the interpretation of the Statutes of the State of Wisconsin, and the impact which such State Laws have upon other State Laws or the ordinances of the CITY OF NEW BERLIN. In such a situation as that at hand, the highest Court of the State of Wisconsin has the final word. *Musser v. State of Utah,* Utah 1948, 68 S.Ct. 397, 333 U.S. 95, 92 L.Ed. 562.

CONCLUSION

For the foregoing reasons, the PETITION FOR WRIT OF CERTIORARI to review the judgment and opinion of the Supreme Court of the State of Wisconsin should be denied.

Respectfully submitted,

Theodore M. Schober, City Attorney
T. Michael Schober, Assistant City Attorney
13825 W. National Avenue
New Berlin, Wisconsin 53151

Attorneys for Respondent